CRIMINAL CODE AMENDMENT BILL 2003

Statement by Deputy Speaker

THE DEPUTY SPEAKER (Ms D.J. Guise): Following the decision of the House to divide the Criminal Code Amendment Bill 2003 into two Bills, the new Bills have been reprinted and are available to members in the Chamber. The clauses in each Bill now appear numbered sequentially. The amendments to each Bill listed on the Notice Paper in the name of the Attorney General have been adjusted to reflect the new clause numbers and page numbers. I understand that amendments have been circulated to all members as version A, dated 11 September 2003.

Consideration in Detail

Resumed from 10 September.

Clause 7: Sections 63 to 67 replaced and *Police Act 1892* consequentially amended -

Debate was adjourned after the clause had been partly considered.

Ms S.E. WALKER: Yesterday I referred to the proposed amendments to the provisions relating to public order. I will ask the Attorney General about the new penalties, the insertion of summary conviction penalties and the softening up of the penalties. Are these offences now impacted on by the new part 7 of the Bill? I will clarify that.

Part 7 is titled "Amendments about the summary trial of indictable offences". The Law Society of WA considers that part 7 is radical and far reaching and that it removes the right to a trial by jury for a great number of offences; that is, offences in a summary jurisdiction. I want to know whether those offences fall within part 7; that is, under part 7 the right to a trial by jury will be removed for certain offences. Are these the offences that will come under these new provisions? I know I am jumping the gun, but I want to know about the amendments on public order.

Mr J.A. McGINTY: The answer is yes. Wherever the summary conviction penalty appears is indicative of the fact that it is an either way offence. In those circumstances, any either way offence will be caught by the provisions of part 7 of the Bill.

Ms S.E. WALKER: That is interesting, because yesterday I said that there was a softening up in relation to these offences. The Attorney General said no. It is quite clear to me, after reading part 7 of the Bill, that the lower court can now decide whether it will try any person charged with public order offences without a jury and summarily. I say that it is a softening up, but I take it no further than that.

Mr J.A. McGINTY: The current penalty for rioting under section 64 of the Criminal Code is imprisonment for three years. In what will be section 65 of the Criminal Code after these amendments are carried, the penalty for taking part in a riot will increase from three years to five years imprisonment. There is also a summary conviction penalty. The insertion of a summary conviction penalty takes into account the fact that, as with most crimes, depending on the circumstances, there are a variety of degrees of seriousness involved. Any extreme or very serious matters would be referred on to be dealt with by trial by jury in the District Court, and the penalty will be increased.

Ms S.E. WALKER: I understand that, but the point I am making is that whereas previously only imprisonment could be imposed, there is now a softer option of imposing a fine. The issue I raised yesterday was that fines to the tune of millions of dollars are not being collected in this State. I see it will be far worse than that because now these people will not be entitled to a trial by jury. That was the point I wished to make.

Clause put and passed.

Clauses 8 to 20 put and passed.

Clause 21: Sections 304 to 312 replaced by sections 304 and 305 -

Mr J.A. McGINTY: I move -

Page 15, line 23 - To insert before "dwelling" the following -

occupants of the

This amendment is designed to ensure that the focus of the defence is on the protection of people occupying the property, and not only the dwelling. The dwelling protection gives rise to a licence to set traps to protect dwellings regardless of whether they are occupied.

Amendment put and passed.

Mrs C.L. EDWARDES: Section 305 of the Criminal Code refers to setting traps. Obviously there are several circumstances in which that would occur. The traps that upset people the most include those set in sand dunes or forests, on property on which bikes are ridden on weekends or, as in the recent incident near Denmark, across a road. Proposed new section 305(2)(b) states -

> knowing or believing that the thing is likely to kill or cause grievous bodily harm to a person.

If a person sets a trap intending not to in any way cause injury but to frighten people - even though we might think it is a stupid thing to do that can have serious and dangerous consequences - does knowing or believing get the Attorney General where he wants to go?

Mr J.A. McGINTY: The effect of these changes is to ensure that the provision relates only to an intentional act; it will not criminalise unintentional acts.

Mrs C.L. Edwardes: However, what happens if a person sets a trap in a sand dune where kids have been known to ride their bikes, thinking that he will just frighten them because they have been causing some level of public nuisance in the neighbourhood, but the consequences are dangerous, even fatal? At the end of the day we do not want that person to have an out by saying that he did not intend to or that he did it for a bit of fun or to frighten them.

Mr J.A. McGINTY: I draw the member's attention to the language used throughout section 305 of the Criminal Code, which relates to the setting of man traps. The word "calculated" appears in the second line; that is, a person sets a man trap calculated to destroy human life. The fourth line contains the word "intent"; that is, a thing placed in any place with the intent that it may kill or inflict grievous bodily harm upon a trespasser or other person. Further on in that section, the word "likely" is used; that is, in any such manner that it is likely to cause any such result. The second paragraph contains the words "knowingly permits". A range of issues that are raised in that section go to the question of intent in the current provisions in the code. In proposed subsection (2)(a) we have used the phrase "intending that the thing will kill or cause grievous bodily harm to a person". In proposed subsection (2)(b) we have used the phrase "knowing or believing that the thing is likely to kill or cause grievous bodily harm". It seems to me to condense the notions that are already essentially contained in section 305 of the code.

Mrs C.L. EDWARDES: The Attorney General needs to include a lesser offence, as well as the one that deals with a deliberate act to do someone grievous bodily harm etc. However, there is no reference to the types of events which I have been talking about and which have been the subject of some media report and speculation over the past couple of years. I know the Attorney General said that he will ensure that the legislation is tightened in order to do so. This does not quite get him there.

I know the Attorney General has widened the definition of "dangerous thing", but I suggest he should think about introducing a lesser offence prior to this legislation going through both Houses, along the lines of its not being intentional although grievous bodily harm and/or a fatality may have occurred as a result of a person's actions. Surely a person would know that, if he put a string or a wire across a major road at Denmark, it would cause serious harm to a motorcyclist; the same would apply with the stakes or wires that are put in the sand dunes at Gnangara. It is not acceptable and it is certainly not fun. I do not think this wording will get the Attorney General to where he wants to be.

Mr J.A. McGINTY: I am advised that the relevant provision which covers the circumstances the member is talking about is section 266 of the Criminal Code dealing with criminal negligence. That is the area under which a person would be prosecuted, where intent could not be proved or was not an element.

Mrs C.L. Edwardes: Why have we not been able to take action against people in the past couple of years? Is that because of the definition of "dangerous thing"?

Mr J.A. McGINTY: Being a machine or an engine?

Mrs C.L. Edwardes: No; wires or stakes.

Mr J.A. McGINTY: I have received advice that the definition of a mantrap - "any person who sets or places any spring-gun, mantrap, or other engine" - limited the meaning to not include the sort of things the member is talking about unless it was an engine.

Mrs C.L. Edwardes: So criminal negligence would cover the circumstances I am talking about with this definition of "dangerous thing".

Mr J.A. McGINTY: Yes. We do not need the definition.

Mrs C.L. Edwardes: Why was action not taken against these people for criminal negligence?

Mr J.A. McGINTY: Because actual injury may not have been caused, even though what we would popularly regard as a mantrap had been set. If injury had been caused, section 266 would apply, otherwise the existing

mantrap section, having a requirement of an engine-like contraption, would exclude a lot of what we popularly regard as mantraps today.

Ms S.E. WALKER: I recall a few years ago providing an opinion on this very point for John McKechnie when he was the Director of Public Prosecutions. It involved a person who was growing cannabis in his backyard and he had a plank with nails in it. I recall that we could not prosecute under this section because it did not come within the definition of mantrap.

Mr J.A. McGinty: Yes.

Ms S.E. WALKER: That may be why there is no prosecution. I think I recommended that that be changed.

Mr J.A. McGinty: Some years later, the Government picked up your recommendation.

Ms S.E. WALKER: I thank the Attorney General, but he has never given me any credit for that. He always takes credit for everybody else's work, so I thought I would just pop that in. I am wondering why the penalty has been set at only three years. Subsection (2) of proposed section 305 contains the intention to cause grievous bodily harm, and subsection (3) states that a person will be liable to imprisonment for three years. Grievous bodily harm referred to in section 297 of the Criminal Code has a penalty of 10 years. Why is it three years for one and 10 years for the other?

Mr J.A. McGINTY: This offence is made without any injury actually occurring. The current penalty for that is three years and we have retained it in the legislation currently before the House.

Ms S.E. WALKER: If a person intends to do less than kill or cause GBH, which section does that come under for a dangerous thing? If something is put there not intending to cause GBH or to kill a person - the mantrap I was speaking about, a plank with some nails in it, which was intended to puncture someone's foot, which would not be grievous bodily harm - it would be bodily harm. There is nothing in the legislation to cover that.

Mr J.A. McGINTY: The answer to the question raised by the member for Nedlands is that if the prosecution cannot establish the necessary intent, and that was an intent to kill or cause grievous bodily harm, and no damage was done to anyone, then no offence has been committed.

Ms S.E. WALKER: I have just looked at this section and I can see right away that a person may intend to cause bodily harm if a person jumps over the wall to get cannabis. The Attorney General should not forget that he is now allowing a lot of people to grow cannabis in their backyards, so a lot of people will be jumping over walls. That means that a person can set a mantrap with an intention to cause bodily harm and get away with it, but if he intends to cause GBH - we are talking now about a serious mantrap - it is an offence. Does the Attorney think that needs amending?

Mr J.A. McGINTY: No. Going back to the time of our childhood, if someone set a rabbit trap and nobody was hurt by it, according to the proposition put forward by the member for Nedlands that would be a criminal offence, because nobody was injured and it could not be established that it was done with the intent of causing death or grievous bodily harm, although that could quite easily be the consequence. That person would then be guilty of an offence. It is necessary to differentiate between proving the necessary intent, the intent that the thing will kill or cause grievous bodily harm and, knowing or believing that the thing is likely to kill or cause grievous bodily harm. The absence of that intent means there is no offence. My advice is that that is the desirable and correct position.

Ms S.E. WALKER: Perhaps I did not explain myself clearly enough. The intention of setting the plank with the nails was just to cause bodily harm, not grievous bodily harm and not death. That is not covered. There could be a variety of mantraps. We must look at the device to see whether that device could cause grievous bodily harm or kill a person, and if it could not, if that device just causes bodily harm, then the person will get off. Does the Attorney General understand what I am saying? We should understand the difference between a device that is intended to cause death or grievous bodily harm and a plank with nails - I am not saying it is what will happen - that will puncture the foot of a person who jumps over a fence. It might not be grievous bodily harm; it might be bodily harm. That is not covered in this legislation. The Bill refers to killing or GBH but not a lesser offence. If the minister does not consider it, the upper House might.

Mr J.A. McGINTY: The purpose of "intent" has always been that it may kill or inflict grievous bodily harm. The essential requirement is that intent must be proved in respect of mantraps. We have retained that intent and have not gone to lesser intent of inflicting actual bodily harm as distinct from grievous bodily harm.

Ms S.E. Walker: I think it is an omission.

Clause, as amended, put and passed.

Clause 22: Section 306 inserted -

Ms S.E. WALKER: I seek leave to move my amendments together.

Leave granted.

Ms S.E. WALKER: I move -

> Page 16, line 21 - To delete "10 years" and substitute "20 years".
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> Page 16, line 29 - To delete "10 years" and substitute "20 years".

Mr J.A. McGINTY: I understand that, broadly speaking, the penalty for female genital mutilation follows a pattern established nationally. The adjustments fit within our Criminal Code and the penalties are consistent with that, in which case the Government opposes the amendments to double the penalty.

Ms S.E. WALKER: I have moved the amendments because of the effects of the act of female genital mutilation on victims. Section 294 of the Criminal Code refers to acts intended to cause grievous bodily harm or prevent arrest. It reads -

> Any person who, with intent to maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, or to resist or prevent the lawful arrest or detention of any person - . . .
>
> Is guilty of a crime, and is liable to imprisonment for 20 years.

Female genital mutilation is a disfigurement. Why should that be any different from the other provision within the Criminal Code? The effects of this are much more serious than, say, disfigurement by someone having an ear cut off. Female genital mutilation may not be visible; nonetheless, the effects are very serious. They reflect on a person's sexual identity. The definition in the Bill reads -

> **"Female genital mutilation"** means -
>
> (a) the excision or mutilation of the whole or a part of the clitoris, the labia minora, the labia majora, or any other part of the female genital organs;
>
> (b) infibulation or any procedure that involves the sealing or suturing together of the labia minora or the labia majora; or
>
> (c) any procedure to narrow or close the vaginal opening,

I looked on the Internet to research the physical and psychological effects of female genital mutilation. I found a human rights information paper from Amnesty International that reads -

> The effects of genital mutilation can lead to death. At the time the mutilation is carried out, pain, shock, haemorrhage and damage to the organs surrounding the clitoris and the labia can occur. Afterwards urine may be retained and serious infection develop. Use of the same instrument on several girls without sterilization can cause the spread of HIV.
>
> . . . the chronic infections, intermittent bleeding, abscesses and small benign tumours of the nerve which can result from clitoridectomy and excision cause discomfort and extreme pain.

Infibulation, which is part of the definition in the Bill can have even more serious long-term effects such as -

> . . . chronic urinary tract infections, stones in the bladder and urethra, kidney damage, reproductive tract infections resulting from obstructed menstrual flow, pelvic infections, infertility, excessive scar tissue . . .

Anyone can log on to that Internet site. The effects get worse. This is important and consideration should be given to the psychological effects if the Government is serious about this. The paper reads -

> The psychological effects of FGM are more difficult to investigate scientifically than the physical ones. A small number of clinical cases of psychological illness related to genital mutilation have been reported.

They include personal accounts of anxiety, terror, humiliation and betrayal, all of which would be likely to have long-term negative effects. It continues -

> . . . Some experts suggest that the shock and trauma of the operation may contribute to the behaviour described as "calmer" and "docile", considered positive in societies that practise female genital mutilation.

The paper also refers to the effects during childbirth and reads -

> During childbirth, existing scar tissue on excised women may tear. Infibulated women, whose genitals have been tightly closed, have to be cut to allow the baby to emerge. If no attendant is present to do

> this, perineal tears or obstructed labour can occur. . . . The constant cutting and restitching of a woman's genitals with each birth can result in tough scar tissue in the genital area.

It is clearly a horrendous practice. It can maim, disfigure and disable people psychologically and physically. Based on the words in the Criminal Code, it is the Opposition's view that the penalty should be increased from 10 to 20 years.

Mrs C.L. EDWARDES: I support the amendment on the basis that 20 years is not unrealistic. The penalty for grievous bodily harm is 20 years. Female genital mutilation should be considered equal to the type of harm -

Mr J.A. McGinty: Are you sure that is right?

Mrs C.L. EDWARDES: Section 294 of the Criminal Code provides for acts intended to cause grievous bodily harm. If a person does certain things he is "guilty of a crime, and is liable to imprisonment for 20 years". The consequences of female genital mutilation are such that the Opposition believes the penalty should be increased. Twenty years is the maximum penalty so a judge can use his discretion. A maximum penalty such as that in the Criminal Code will give a clear indication that this Parliament regards female genital mutilation as a serious offence.

Ms S.E. WALKER: I was asked by a member of the media if female genital mutilation is practised in this country. Given the Attorney General has the Director of Prosecutions with him, can he tell me whether any cases have been reported? I raise that because the paper from the Internet titled "BetterHealth" states that FGM is the partial or complete removal of the external female genitals for cultural rather than medical reasons.

I raise this because of the way the procedures are carried out. We are not talking about people doing things overseas but about overseas procedures being done here. The paper refers to the complications and health risks. It reads -

> In many cases, the procedure is performed by medically untrained women using unsterilised equipment, such as razor blades or shards of glass. . . . Some of the complications and health risks include:
>
> - Severe pain
> - Bleeding
> - Shock from loss of blood
> - Death
> - Infection, such as septicaemia, tetanus or blood-borne diseases
> - Scarring, cysts and abscesses
> - Blocked flow of urine, so that urination may take up to 15 minutes
> - Urinary incontinence
> - Recurring urinary tract infections
> - Infections of the pelvis
> - Increased risk of infertility
> - Painful sexual intercourse
> - Reduced sexual enjoyment
> - Childbirth difficulties, such as severe tearing and haemorrhage
> - Posttraumatic stress syndrome, including nightmares and flashbacks.

I recall an opinion being provided on this issue by Anna Lonahan, a professional assistant to the former Director of Public Prosecutions. The research is available. Have any such cases arisen in Western Australia? Will the Attorney General increase this penalty to 20 years imprisonment?

Mr J.A. McGINTY: In respect of the two points raised by the members for Kingsley and Nedlands, the Director of Public Prosecutions advises me that no cases in the past four years have been brought to his attention for the purposes of prosecution under the existing provisions of the Criminal Code in relation to grievous bodily harm, which arguably this procedure is caught under in any event. I am aware, having spoken to an obstetrician-gynaecologist working at King Edward Memorial Hospital for Women, that in her experience over two years, approximately 72 women had presented in respect of their pregnancies and been identified as women who had been genitally mutilated.

Mrs C.L. Edwardes: You don't know whether it was done in this country or overseas.

Mr J.A. McGINTY: No, although it is thought to be unlikely that all of them were done overseas. I am aware of a woman I personally met whose parents wanted her to return to Africa for the purposes of having the procedure performed on her. She is currently a resident of Western Australia. I do not think it is all historical.

Mrs C.L. Edwardes: If it happens and they go back to Africa for the procedure, yet are residents of Western Australia, where do our laws fit in?

Mr J.A. McGINTY: There is provision to make criminal the behaviour of a person who facilitates another person's travelling overseas for this procedure to be performed on that person. In the case I recall, the woman's parents were in Kenya pressuring her to return for this purpose. That was the story I was told.

Returning to the nature of the penalty, the penalty for grievous bodily harm under the Criminal Code is 10 years imprisonment. As the member rightly pointed out, the penalty of 20 years applies for GBH with the intent to commit GBH. It is arguable where it ought to lie. My advice is that the 10 years imprisonment proposed in the Bill will align it with the GBH provisions of the code, and that that is consistent with the legislation enacted elsewhere in Australia. That may not directly be the case, but it is the advice I have received. Therefore, the Government will not support the amendment to increase the penalty to 20 years imprisonment.

Ms S.E. WALKER: Under section 294 of the code, the offence of "acts intended to cause grievous bodily harm" is given extra penalty time because it involves maiming, disfiguring or disabling. It is clear from reading any article on web sites that that is exactly what female genital mutilation does, and is intended to do. Brown's *Criminal Law Western Australia*'s commentary for that offence reads that deterrence both general and particular is a permanent consideration when determining a proper sentence for an offender convicted for an offence against that section. Therefore, I urge the Attorney General again to reconsider the amendment relating to a most despicable act. It goes to a person's sexual being, and has a profound effect on a person, beyond all the things I indicated. I hope that the Attorney General may change his mind; he does sometimes when legislation is sent to the other place and out of this Chamber and the Attorney has a chance to think about it.

Amendments put and a division taken with the following result -

Ayes (16)

Mr C.J. Barnett	Mr J.H.D. Day	Mr M.G. House	Mr M.W. Trenorden
Mr D.F. Barron-Sullivan	Mrs C.L. Edwardes	Mr R.F. Johnson	Ms S.E. Walker
Mr M.F. Board	Mr B.J. Grylls	Mr P.D. Omodei	Dr J.M. Woollard
Dr E. Constable	Ms K. Hodson-Thomas	Mr P.G. Pendal	Mr J.L. Bradshaw *(Teller)*

Noes (23)

Mr P.W. Andrews	Mr J.C. Kobelke	Mr A.D. McRae	Mrs M.H. Roberts
Mr A.J. Dean	Mr F.M. Logan	Mr N.R. Marlborough	Mr D.A. Templeman
Mr J.B. D'Orazio	Ms A.J. MacTiernan	Mr M.P. Murray	Mr P.B. Watson
Dr J.M. Edwards	Mr J.A. McGinty	Mr A.P. O'Gorman	Mr M.P. Whitely
Dr G.I. Gallop	Mr M. McGowan	Mr J.R. Quigley	Ms M.M. Quirk *(Teller)*
Mr J.N. Hyde	Ms S.M. McHale	Ms J.A. Radisich	

Pairs

Mr M.J. Birney	Mr J.J.M. Bowler
Mr R.N. Sweetman	Mr R.C. Kucera
Mr B.K. Masters	Mr A.J. Carpenter
Mr T.K. Waldron	Mr E.S. Ripper

Amendments thus negatived.

Clause put and passed.

Clauses 23 to 26 put and passed.

Clause 27: Section 1 amended -

Ms S.E. WALKER: Part 7 is a little disturbing. I have been disturbed by a lot of the stuff the Attorney General has introduced, but this is also disturbing for the Law Society of Western Australia. The Law Society says in its submission to the Opposition that this part is radical and far-reaching because it removes the right to trial by jury for a great number of offences. According to the Law Society -

> The present position is that there are three categories of offence, those being crimes, misdemeanours - together called indictable offences - and simple offences. In broad terms, presently the law allows summary trial for a large number of indictable offences. However it is the accused who must elect summary trial subject to a discretion in the court of petty sessions to refuse that election if it considers that it cannot adequately deal with the charge.

This Bill will remove that right of the accused because it restricts the right to be tried on indictment. The Law Society says -

> Earlier attempts to restrict trial by jury of indictable offences were confined to offences of stealing of modest amounts. One of the significant criteria to which the court of petty sessions is compelled to have regard is to whether the summary conviction penalty is adequate to deal with the offence. Courts of petty sessions may presently refuse an accused's election for summary jurisdiction if of the view that a charge cannot "adequately be dealt with summarily". This decision is hardly ever made.
>
> It is likely that defendants who intend to plead guilty will wish in any event to be dealt with by a court of petty sessions because the summary conviction penalties are always much less.

The Law Society says there will be a shift of a significant burden of the work from the District Court to the Court of Petty Sessions. My first question is: has there been a consideration of the resourcing that will be required to deal with that shift in the burden of work to the Court of Petty Sessions? The amendments in this Bill relating to public order will result in many offences being tried summarily - depending on the facts of course. The Law Society and the Opposition are concerned about the erosion of the right to trial by jury. It is of great significance. The Opposition also takes offence at the provisions that remove the right of an accused person charged with wilful murder to a trial by jury by making the judge, rather than the community, responsible for the determination of intent.

The Law Society says that, through these amendments, the Government is eroding the right to a trial by jury. The decision that someone will be tried by a judge alone will be made by the magistrate or two justices of the peace. The Law Society argues, and the Opposition agrees that -

> One of the great strengths of our criminal justice system is that a person charged with a serious criminal offence is entitled to be tried by judge and jury.
>
> The Society opposes the abolition of the right of an accused person on a serious criminal charge to be tried by judge and jury.

Why is the Attorney General taking this radical step to prevent, in many circumstances, citizens of this State being denied the right to a trial by jury?

Mr J.A. McGINTY: It was recommended by the Law Reform Commission. Something similar has been mooted, if not implemented, in England. It seems to represent a sensible allocation of work between the Magistrate's Courts and the District Court. We calculated the amount of magisterial work that would be saved if preliminary hearings were abolished. It was estimated that one and a half full-time magistrates would be freed up as a result of the abolition of preliminary hearings. That is step one. Step two of the process is to enable magistrates to hear many more of the minor charges that currently go to the District Court. The net effect of this should be neutral in the Magistrate's Courts but save time in the District Court, which, as members opposite would be aware, is the most pressing area in relation to waiting times in the criminal jurisdiction. The collective result of this series of changes will hopefully be to relieve the work pressure on the District Court and free up the time of that court so that the waiting time for a trial is reduced.

Mrs C.L. EDWARDES: In my contribution to the second reading debate, I alerted the Attorney General that I would ask him how many people on indictable charges that could be heard by a jury choose to go forward to the District Court in any one year?

Mr J.A. McGINTY: I thank the member for Kingsley for giving me some notice of that matter. I asked the Department of Justice to provide me with its figures from the courts. The best I am able to give is for the 2002 calendar year. I cannot think of any reason that should be unusual. In 2002, 10 229 defendants for one or more either-way offences were sentenced in a Court of Petty Sessions, while 823 were sentenced in the District Court. That is not necessarily the complete answer to the question.

Mrs C.L. Edwardes: Might it be that not all those 800 cases involved the option of summary jurisdiction?

Mr J.A. McGINTY: No; these are either-way offences. Section 32 of the Sentencing Act enables someone appearing in the District Court to call up other outstanding offences so that they are all dealt with at once. A number of those 823 people who were sentenced in the District Court could fit into that category of people who did not elect to go to the District Court but who were dealt with under section 32 of the Sentencing Act. As best

I am able to give the annual figures, 10 229 either-way offences were dealt with in the Court of Petty Sessions and 823 were dealt with in the District Court. I also have a breakdown of those figures that may be of interest to the member. The breakdown refers to the relevant sections of the Criminal Code, the penalty imposed and the like. Quite a bit of work has been done in the past 24 hours to get this information together.

Mrs C.L. Edwardes: Do you want to table that?

Mr J.A. McGINTY: I am happy to table it.

The DEPUTY SPEAKER: The Attorney General can seek leave to have it incorporated in *Hansard* if he wishes.

Mr J.A. McGINTY: I am happy to simply table it.

[See paper No 1477.]

Ms S.E. WALKER: I thought the member for Kingsley asked the Attorney General how many people had elected to go to trial. Is that right, member for Kingsley?

Mr J.A. McGinty: Yes, but I provided the information that I could get in the time available.

Ms S.E. WALKER: The Attorney General provided the number of people who have been sentenced. That is totally different. A person could plead guilty, and many people do. The figure of 10 229 does not represent the number of people who elected to go to trial.

Mrs C.L. Edwardes: However, it can be said that 800 elected to have their matters heard by a jury in the District Court. That does not account for the Sentencing Act issue the Attorney General mentioned.

Mr J.A. McGinty: I think that is right. I appreciate that I have not directly answered the question. However, it was the best sentencing information I could get.

Ms S.E. WALKER: The issue is this: at the moment it is the accused who elects to have a summary trial in the Court of Petty Sessions, subject to the discretion of the magistrate. I give an example relating to the amendments to the public order provisions. Someone charged with unlawful assembly under proposed new section 64, could, under the current system, elect to have the matter heard in the Court of Petty Sessions. However, if the magistrate said that he did not think that was appropriate, the matter would go to the District Court. Under the changes proposed in part 7 of the Bill, the accused would not be able to choose to have his case heard by a jury in the Court of Petty Sessions. I am a little horrified at what the Attorney General is telling me. He said that this change has been mooted in England. Has the right to trial by jury been taken away elsewhere in Australia? It is serious. It is important that a person is tried by a number of his peers and not simply one person. The Attorney General has said that the reason he is doing this is resources. Whatever happened to justice? Justice costs a lot of money. However, removing a person's right to a trial by jury is not the way to go. That is the issue here, and that is the issue for the Law Society.

Clause put and passed.

Clauses 28 to 58 put and passed.

Clause 59: Section 81 replaced -

Mrs C.L. EDWARDES: One of the issues that came up during debate this morning on the Victims of Crime Amendment Bill was that volunteers who work in the Victim Support Service are required to sign an agreement to ensure that the information they receive about victims remains confidential. I do not think the Attorney General was in the House at the time, because I looked for him specifically so that we could bring into the debate this clause, which deals with disclosing official secrets. I do not know whether this comes within the official secrets section or another section of the Criminal Code, but can the Attorney General advise the House whether criminal action can be taken against a volunteer who has signed such an agreement but discloses confidential information about a victim?

Mr J.A. McGINTY: The advice I have received is that a volunteer would come within the definition of "government contractor" at page 38 of the Bill; namely, a person who is not employed in the public service but who provides, or is employed in the provision of, goods or services. I guess it would depend upon the meaning of the word "employed", but a person who provides services to victims of crime I think would be caught by this provision, so I suspect the answer to the question is yes.

Clause put and passed.

Clauses 60 to 76 put and passed.

Schedule 1 -

Ms S.E. WALKER: Can the Attorney General tell me whether the schedule that impacts on homicide is still in the Bill?

Mr J.A. McGinty: It has been removed and re-numbered.

Ms S.E. WALKER: Therefore I cannot make the Attorney General squirm and feel uncomfortable.

Mr J.A. McGinty: On another occasion.

Schedule put and passed.

Schedule 2 put and passed.

Schedule 3 -

Mr J.A. McGINTY: I move -

Page 56, after line 8 - To insert the following -

4. *Children's Court of Western Australia Act 1988* amended

(1) The amendments in this clause are to the *Children's Court of Western Australia Act 1988**.

[* *Reprinted as at 25 August 2000.*

For subsequent amendments see Western Australian Legislation Information Tables for 2002, Table 1, p. 54.]

(2) Section 19B(1), (2) and (3) are repealed and the following subsections are inserted instead -

"

(1) If a child is charged with an indictable offence and -

(a) the circumstances of the alleged offence are such that, if an adult were charged with it, it must be tried on indictment; or

(b) the circumstances of the alleged offence are such that -

(i) if an adult were charged with it, it could, by virtue of section 5 of *The Criminal Code*, or another written law, be tried either on indictment or summarily; and

(ii) the Court, having complied with section 99(2) of the *Justices Act 1902*, decides that it is to be tried on indictment,

the child may elect to be tried on indictment by the Supreme Court or the District Court (as the case requires), and the Court shall so inform the child.

(2) If a child is charged with an indictable offence and the circumstances of the alleged offence are such that the child is not entitled to make an election under subsection (1), the Court shall, subject to the provisions referred to in section 19(1), hear and determine the charge summarily.

(3) If a child makes an election under subsection (1) -

(a) the Court, under Part V of the *Justices Act 1902*, shall deal with the charge, commit the child to the Supreme Court or the District Court (as the case requires) and exercise the jurisdiction and powers conferred on justices; and

(b) the *Justices Act 1902* applies,

as if the charge were one that must be tried on indictment.

".

(3) Section 19B(4) is amended by deleting ", and the charge, if an adult were similarly charged before a court of petty sessions, could not be dealt with summarily".

(4) Section 19C(1) is repealed and the following subsection is inserted instead -

"

(1) Notwithstanding section 19B, if -

(a) the Court is satisfied -

(i) that a person who has reached 18 years of age (the **"adult"**) is charged with the same indictable offence as a child or with an indictable offence arising from the same acts, omissions, or circumstances as are alleged against a child charged with an indictable offence; and

(ii) that the adult is to be tried on indictment for the offence;

and

(b) the Court is for any reason of the opinion that it is appropriate that the child be dealt with on indictment jointly with the adult,

then -

(c) the Court, under Part V of the *Justices Act 1902*, shall deal with the charge, commit the child to the court where the adult is to be tried and exercise the jurisdiction and powers conferred on justices; and

(d) the *Justices Act 1902* applies,

as if the charge were one that must be tried on indictment.

".

(5) Section 19C(3) is amended as follows:

(a) by deleting "subsection (1)(d)" and inserting instead -

" subsection (1) ";

(b) by deleting "section 19B(3) or (4)" and inserting instead -

" section 19B(2) or (4) ".

Page 60, after line 2 - To insert the following -

12. *Family Court Act 1997* amended and consequential amendment to *Sentencing Legislation Amendment and Repeal Act 2003*

(1) The amendments in this clause are to the *Family Court Act 1997** except where otherwise indicated.

[* *Act No. 40 of 1997.*

For subsequent amendments see Western Australian Legislation Information Tables for 2002, Table 1, p. 130-1.]

(2) Section 243(5) is amended as follows:

(a) by deleting "an indictable offence" and inserting instead -

" a crime ";

(b) by inserting at the foot of the subsection -

"

Summary conviction penalty:

(a) in the case of a body corporate, a fine of $5 500;

(b) in any other case, a fine of $2 750.

".

(3) Section 243(6) is repealed.

(4) If this clause comes into operation before the *Sentencing Legislation Amendment and Repeal Act 2003* section 60 comes into operation, that section is repealed.

".

The scheme that has been created in respect of the ordinary criminal courts - the Magistrate's Court and the District Court - is sought to be replicated in respect of the Children's Court and the Family Court. There is, for instance, in the Children's Court of Western Australia Act provision for a defendant to elect to be tried not before the president - in other words, before a judicial officer alone - but rather before a jury in the District Court. That is similar to the election that is available in the Magistrate's Court at the moment to go before a jury in the District Court. What we are seeking to do in respect of the Children's Court and the Family Court is to replicate the new scheme so that an application must be made to the presiding judicial officer, which in the case of the Children's Court is the President of the Children's Court, for the matter to be sent to the District Court for a trial on indictment before a jury. It will then be up to the president to determine the matter, in the same way that it is up to the magistrate to determine whether the matter should be dealt with by the magistrate or referred on.

Mrs C.L. Edwardes: What happens now?

Mr J.A. McGINTY: At the moment a defendant can make an election. I asked the Director of Public Prosecutions who would want to elect as a child to be dealt with by a jury in a district court trial rather than by the president, and the answer was that the person might think that he had a better chance in terms of conviction if he came before a jury rather than before a judicial officer sitting alone. We are seeking to replicate the new scheme for those other two courts so that it will be across jurisdictions. It will be for the lower court judicial officer to determine whether the matter fits within the test that is provided for reference to the superior court.

Amendments put and passed.

Mr J.A. McGINTY: I move -

Page 64, line 6 - To delete "petty sessions" and substitute "summary jurisdiction".

Page 64, after line 21 - To insert the following -

(2) A court of summary jurisdiction that tries a person summarily for a charge of an offence referred to in subsection (1) must be constituted by a magistrate sitting alone.

Page 64, line 22 - To delete "summary court" and substitute "court of summary jurisdiction".

As members can see, these amendments are grammatical only in their nature.

Ms S.E. WALKER: Under these proposed amendments, can a person now be dealt with summarily by two justices of the peace without trial?

Mr J.A. McGinty: Yes.

Ms S.E. WALKER: Two laypersons can deal with a person instead of that person having a trial by jury with a magistrate. Can a person now have a jury trial with two justices of the peace?

Mr J.A. McGINTY: Juries sit on indictable matters; therefore, it would not be possible for two justices of the peace to sit with a jury - if that was the question.

Ms S.E. Walker: Under the new provisions, can they now deal with a matter summarily alone?

Mrs C.L. Edwardes: When a magistrate is not available?

Ms S.E. Walker: Yes. What I am saying is that an accused person who wants to have a trial will not now be able to. Will two JPs sitting together be in a position to decide that a person cannot have a trial?

Mr J.A. McGINTY: I understand the question and I ask the member to bear with me. The amendments we are dealing with at the moment relate to a provision under the Misuse of Drugs Act, which prevents a JP from determining those matters summarily.

Ms S.E. Walker: But generally under the provision -

Mr J.A. McGINTY: That is what I am coming to now. The answer to the member's question is to be found in clause 29, which repeals and replaces section 5 of the Criminal Code. I refer the member in particular to subclause (11) on page 24, which states -

> For the purposes of this section and of any summary trial of the charge, the court must be constituted by a magistrate alone, or if there is no magistrate and the defendant consents, by 2 justices.

Ms S.E. Walker: Yes, but my point is that it deals with a summary trial. I am talking about the position that people will not now be able to have a summary trial, but will have a trial by judge or magistrate alone.

Mr J.A. McGINTY: I am sorry, I do not understand the question.

Ms S.E. Walker: The accused can no longer elect to have a summary trial.

Mr J.A. McGINTY: That is right.

Ms S.E. Walker: Is that a decision of the magistrate?

Mr J.A. McGINTY: Yes.

Ms S.E. Walker: Can JPs decide that?

Mr J.A. McGINTY: If a defendant in a case in a more remote part of the State consents to the justices of the peace hearing the matter and conducting the trial, it must be dealt with by a magistrate. There is a measure of flexibility, but only by consent of a defendant who is satisfied to have the matter dealt with by two justices of the peace, and it is solely within the province of the defence to consent to that; otherwise it must be dealt with by a magistrate.

Ms S.E. Walker: Apparently only an appointed magistrate can conduct a summary trial.

Mr J.A. McGINTY: I do not believe that is right. I will find the particular provision. However, the Justices Act enables justices of the peace to conduct trials.

Ms S.E. Walker: Only in relation to certain offences?

Mr J.A. McGINTY: No, a justice of the peace has the same powers as a magistrate. I will check the precise formulation of the provision, but there is a requirement that, when the penalty imposed by the justice of the peace is a term of imprisonment, the sentence must be reviewed by a magistrate. However, the trial and sentence, including a term of imprisonment, is presided over by a justice of the peace or two justices of the peace sitting together. It is becoming less common, particularly as magistrates in country areas do circuits and the like, but justices of the peace can preside over both trial and sentencing.

Ms S.E. WALKER: I only raise this matter now because I want the Legislative Council to examine it. However, I am surprised that currently two JPs can summarily try a person for an indictable offence.

Mr J.A. McGinty: Yes, they can.

Ms S.E. WALKER: If that is right, I am concerned about people in remote areas where there is a language problem. I recently visited the Kimberley and talked to a lot of people there about the issues and problems that Aboriginal people have in understanding what is happening to them in court. The current situation, as I understand what the Attorney General is saying, is that an accused can elect, if the magistrate agrees, to have an indictable matter tried summarily. The Attorney General is saying that that trial can occur before a magistrate and two JPs. He is saying that two persons not learned in the law - which I suppose is a good way of putting it - can conduct a jury trial.

Mr J.A. McGinty: Not a jury trial.

Ms S.E. WALKER: I am talking about a jury trial.

Mr J.A. McGinty: They can try an indictable offence summarily. A justice of the peace does not preside over a jury trial.

Ms S.E. WALKER: That is my point.

Mr J.A. McGINTY: The member might recall that last week I referred to a case in Wiluna of stealing, which is an indictable offence. The matter involved two Wiluna shire councillors, one a JP and the other the accused. I reported it to the Parliament because there was a significant impropriety in that the trial took place in the police sergeant's office. There was an alleged forgery and other impropriety by people associated with them. However, for present purposes, the trial should have taken place before two JPs and a penalty imposed. As it turned out the defendant pleaded guilty, but had he pleaded not guilty, the trial could well have taken place before the justices of the peace. This is now saying that in the future, JPs will be able to deal with those matters only with the consent of the defendant. That is not a current requirement.

Amendments put and passed.

Mr J.A. McGINTY - by leave: I move -

Page 65, line 9 - To delete "petty sessions" and substitute "summary jurisdiction".

Page 65, after line 25 - To insert the following -

(2) A court of summary jurisdiction that tries a person summarily for a charge of an offence referred to in subsection (1) must be constituted by a magistrate sitting alone.

Page 65, line 26 - To delete "summary court" and substitute "court of summary jurisdiction".

Amendments put and passed.

Mr J.A. McGINTY: I move -

Page 66, after line 26 - To insert the following -

18. *Offshore Minerals Act 2003* amended

(1) The amendments in this clause are to the *Offshore Minerals Act 2003**.

[* *Act No. 10 of 2003.*]

(2) Section 404(3) is amended by inserting at the foot of the subsection -

"

Summary conviction penalty: imprisonment for 2 years or a fine of $10 000 or both.

"

.

(3) Section 404(4) and (5) are repealed.

The purpose of this amendment is to create a summary conviction penalty for certain offences under the Offshore Minerals Act.

Amendment put and passed.

Schedule, as amended, put and passed.

Title put and passed.

House adjourned at 5.23 pm